

Cautionary Note Regarding NDA's

Often companies have a form NDA which is used in all situations without legal review. This can be dangerous because, before entering into an NDA, you must separately evaluate the following risks:

- (1) The risk of the counterparty misusing your confidential information.
- (2) The risk of your being burdened by the duty to be accountable to the counterparty for your use of information claimed by the counterparty as its confidential information.

Frequently risk(2) can be much greater than risk (1) in which case you may press to use only a unilateral agreement or otherwise insist that the counterparty not provide you with information that it wants you to treat as confidential. If both risks are present but risk (2) is expected to be greater than risk (1), you should consider some filtering mechanism before information is to be treated as confidential; for example, each party designates a gate keeper for that party, the information the other party wants to disclose being presented to the gate keeper in a non-confidential overview form, to allow the gate keeper to determine whether to assume the risk of a confidential disclosure. Also you should press for a short confidentiality period.

If risk (1) is expected to be greater than risk (2), you should cover all disclosures, written and oral, and press for a period which lasts until the information enters the public domain without fault of the counterparty. Also there should be a limited list of counterparty personnel to whom the information can be disclosed and severe restrictions on the use of the information including a provision prohibiting reverse engineering.